NO. 22784

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DENNIS FRAZIER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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I

JURISDICTIONAL STATEMENT

On October 4, 1967, a three count indictment was returned against the defendant, Dennis Frazier, by the Federal Grand Jury for the Central District of California [C. T. 2]. 1/

The indictment charged the defendant with the violation of Federal laws relating to the possession and sale of marihuana.

The defendant was found guilty on all three counts by a jury verdict on December 6, 1967.

1/ "C. T." refers to Clerk's Transcript.

On January 8, 1968, the defendant was sentenced to the custody of the Attorney General for five years on each of the three counts, with the sentences to run concurrently [C. T. 19].

Defendant's Notice of Appeal was timely filed [C. T. 20]. The jurisdiction of the District Court was predicated on Title 18, United States Code, Section 3231; Title 21, United States Code, Section 176(a); and Title 26, United States Code, Section 4742(a). This Court has jurisdiction under Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES INVOLVED

Title 21, United States Code, Section 176a provides in pertinent part as follows:

> "Whoever, knowingly, with intent to defraud the United States, receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marijuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000.
>
> "Whenever on trial for a violation of this subsection, the defendant is shown to have had the

marijuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

Title 25, United States Code, Section 4742(a) provides in pertinent part as follows:

"It shall be unlawful for any person . . . to transfer marijuana, except in pursuance of a written order of the person to whom such marijuana is transferred, on a form to be issued for that purpose by the Secretary or his delegate."

Title 26, United States Code, Section 7273(b) provides in pertinent part as follows:

"Whoever commits an offense . . . described in . . . section 4742(a) shall be imprisoned not less than five years or more than 20 years, and in addition, may be fined not more than $20,000."

III

QUESTIONS PRESENTED

A. Was defendant's privilege against self-incrimination violated by reason of his conviction for failure to comply with the requirements of the Marijuana Tax System?

B. Was defendant's conviction obtained by impermissible entrapment as a matter of law?

C. 1. Did the trial court commit plain error in instructing the jury as to the quantum of proof in relation to the defense of illegal entrapment where the court's instruction was based on the case of Notaro v. United States, 363 F. 2d 169 (9th Cir. 1966)?

2. Is entrapment an issue for the court rather than for the jury to decide?

D. Is the time period from July 28, 1967 (date of the transaction which led to counts one, two and three) to September 13, 1967 (date of arrest) a sufficient lapse so as to violate the defendant's fifth amendment rights?

IV

STATEMENT OF FACTS

In June, 1967, Roger Knapp was an agent with the Federal Bureau of Narcotics [R. T. 52]. 2/

On or about June 10, 1967, one Craig Lasha, a special employee of the Bureau of Narcotics, introduced Agent Knapp to the defendant, Dennis Frazier. The introduction took place at a special gathering at the residence of the defendant [R. T. 53]. Agent Knapp asked the defendant if he could purchase some

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2/ "R. T." refers to Reporter's Transcript.

narcotics from him. The defendant said that he could. Agent Knapp requested the defendant's phone number which the defendant wrote down and gave to Knapp [R. T. 54].

On June 26, 1967, Agent Knapp phoned the defendant and inquired as to the purchase of five kilograms of marijuana. The defendant said he thought he could get them but would have to make a few phone calls. It was agreed that Knapp would call back on the 28th [R. T. 55].

On June 28th, Knapp called the defendant and asked if he could purchase the marijuana from the defendant that evening. The defendant related that he was ready and it was agreed that Knapp would meet the defendant at his residence that evening [R. T. 56].

Knapp arrived at the defendant's house that evening and upon his arrival was met by the defendant. Knapp asked if everything was all right for the purchase and the defendant replied that it was and then asked Knapp to go into his house with him since he had to call his source of supply and let him know they were on the way [R. T. 56, 57]. Both men then entered the defendant's house where the defendant made a phone call. About a half hour later, Knapp and the appellant drove off in the appellant's automobile.

Charles Henry, agent with the Federal Bureau of Narcotics was present in the area of the defendant's house on the evening of the 28th in a surveillance capacity. Agent Henry observed Knapp arrive at the defendant's residence and further observed the defendant meet Knapp alongside Knapp's auto and saw both men

enter the defendant's house [R. T. 87, 88].

The defendant and Knapp proceeded (under Agent Henry's surveillance) to the intersection of Cochran and Dockweiler Streets in Los Angeles where the defendant parked and told Knapp to wait while he checked to see if everything was all right. The defendant then walked away [R. T. 57] and was observed to walk into an apartment complex [R. T. 88]. A few moments later the defendant returned and related to Knapp that his source did not want to meet Knapp and therefore the defendant requested the money from Knapp. During this conversation, an unidentified Negro was observed to get into a Corvair automobile which was parked in front of the defendant's car [R. T. 57].

Knapp gave the defendant the money and the defendant was observed to get into the Corvair with the unidentified male and drove off [R. T. 58, 89].

At approximately 10:00 P. M., the Corvair was observed to return to the area and the defendant was observed to exit the Corvair with a brown bag in his hands and to proceed to his own vehicle in which Knapp was still sitting. The defendant got into his own auto and placed the bag, which had the name Britt on it, in the rear seat of his car and the defendant and Knapp then drove back to the defendant's house [R. T. 58, 59, 90]. When they arrived in front of the defendant's house Knapp inspected in the defendant's presence, the contents of the "Britt" bag and counted out the five brick-shaped objects in the bag [R. T. 59]. Knapp then placed the bag in his government vehicle which was parked across

the street and then went with the defendant into the defendant's house [R. T. 59, 90].

While in the defendant's house, the defendant complained that he had not made enough out of the transaction to justify the amount of traveling he did. The defendant further stated he was rather unhappy with the amount he received [R. T. 60]. At no time during the transfer, or at any other time, did the defendant request of Knapp an order on a form issued for that purpose by the Secretary of Treasury [R. T. 63, 64].

After leaving the defendant's house that evening, Knapp proceeded to the Los Angeles Office of the Federal Bureau of Narcotics where in the presence of Agent Henry, he dated and initialed each of the five brick-shaped objects as well as the Britt bag. All these items were then locked up until the following morning when Knapp delivered them to the Los Angeles Sheriff's Office Chemist [R. T. 61].

The Britt bag as well as the five brick-shaped objects were admitted into evidence as Government's Exhibit No. 1 [R. T. 63]. A stipulation was entered into between the plaintiff and defendant "that the five bricks involved in this case, compressed plant material and seed, which has a total weight of approximately 5,000 grams, has been identified as Cannabis sativa, or marijuana; . . . ." The bricks were analyzed by Mr. Kayne who is a chemist employed by the Los Angeles County Sheriff's Department [R. T. 501].

V

ARGUMENT

A.

(1) DEFENDANT'S PRIVILEGE AGAINST SELF INCRIMINATION WAS NOT VIOLATED BY REASON OF HIS CONVICTION FOR FAILURE TO COMPLY WITH THE REQUIREMENTS OF THE MARIHUANA TAX SYSTEM.

The defendant asserts that the requirements of the Marihuana Tax statutes as set out in Title 26, United States Code, Sections 4741 through 4775 provide incriminatory information and therefore violate his privilege against self-incrimination. The defendant is relying almost entirely on three recent Supreme Court decisions:

Marchetti v. United States, 390 U.S. 39 (1968);

Grosso v. United States, 390 U.S. 62 (1968);

Haynes v. United States, 390 U.S. 85 (1968).

The Marchetti and Grosso cases are concerned with gambling while the Haynes case is concerned with firearms. In both of these types of cases the obligations under the registration statutes with which the individuals were charged with having failed to comply, created a real and appreciable risk of incrimination. Marchetti v. United States, supra, at 48. Further the Supreme Court stated in Albertson v. S.A.C.B., 382 U.S. 70, 79 (1965) that registration provisions compelling disclosure of incriminating information contravene the Fifth Amendment when the requirements

are directed at a highly selective group inherently suspect of criminal activities.

The Marihuana Tax Act can easily be distinguished. The Federal Marihuana controls are aimed primarily at the regulation of the legitimate market in marihuana and apply only to activities which are otherwise lawful. Those who cannot deal in marihuana lawfully under local law cannot seek or obtain tax-paid order forms from the federal government, and thus those who are permitted to comply with this act cannot, by definition, be incriminating themselves.

The Marihuana Tax Act of 1937 was intended to raise revenue through occupational and transfer taxes on the trade in marihuana while at the same time discouraging the widespread use of the drug by smokers and addicts.

> S. Rep. No. 900, 75th Cong. 1st Sess. 2 (1937) (hereafter "S. Rep."); H. R. Rep. No. 792, 75th Cong. 1st Sess. 1 (1937) (hereafter "H. Rep.").

Congress therefore was careful to distinguish in its control provisions between the socially-acceptable market for marihuana and the illicit traffic in the drug. The Senate Committee explained (S. Rep. p. 3):

> " * * * the bill is designed, through the occupational tax and the order form procedure, to publicize <u>legitimate</u> dealings in marihuana and through the $100 transfer tax to prevent the drug

from coming into the hands of those who will put it to illicit uses." [Emphasis added].

The House Committee agreed (H. Rep. p. 2):

"All legitimate handlers of marihuana are required to pay occupational taxes * * *.

"These persons, in addition to paying the occupational tax, must register with the collector of internal revenue and file information returns as to their dealings in marihuana." [Emphasis added].

Both committees explained that the $100 per ounce transfer tax, backed by criminal sanction, would be applicable to unregistered transferees, "who under ordinary circumstances will be illicit users of marihuana." (S. Rep. p. 3; H. Rep. p. 2).

Section 4741 imposes a transfer tax on all transfers of marihuana (with a few irrelevant exceptions), whether or not to a person who has registered and paid the occupational tax, and the amount of the tax depends on whether or not the transferee has registered. Thus, it is undeniable that Congress did contemplate that its transfer tax would reach unregistered individuals, whom it foresaw as those without a justifiable purpose for dealing in the drug.

Section 4742(a), which the defendant was found to have violated, makes it criminal "for any person", whether or not required to register and pay the occupational tax, to transfer

marihuana, "except in pursuant of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate."

These above quoted provisions indicate that Congress in 1937 contemplated that there could be authorized transfers to persons who were not in the categories of required registrants. But this is completely consistent with the construction of the Act which we regard as the only one designed to achieve its announced purposes, for in 1937 about one-fifth of the states still had no meaningful narcotics laws governing the acquisition of this drug. Thus, when Congress acted, it would have been possible for a non-registrable individual to make purchases of marihuana -- lawfully -- in those state if he was willing to pay the $100 per ounce tax designed to discourage just such dangerous ventures. And we have no doubt that such an individual could have insisted that he be issued a blank order form with which to consummate his lawful transaction.

Since that enactment, however, all states and the District of Columbia have adopted comprehensive controls based on the Uniform Narcotic Drug Act, limiting marihuana dealings to defined categories of professionals with some justifiable reason for handling the drug. Hence, the small group of unregistered persons who in 1937 could have engaged in marihuana transactions lawfully under local law and thus have obtained an order form from the federal government to sanction the transfer has now disappeared. Thus, in practical fact, there is and can be now no collection of the

transfer tax before the transfer occurs from, and no issuance of an order form to, anyone who is not registered as lawfully entitled to deal in marihuana. 3/ This situation -- which precludes the possibility of any clash with the privilege against self-incrimination -- is underscored by virtue of the implementing regulations issued by the Commissioner of Internal Revenue and the Commissioner of Narcotics. Responding to the altered legal climate that developed after 1937, these regulations now specify formally what was clearly the intent of Congress at the time this Act was passed. Thus, for any one desiring to be registered (26 C. F. R. §152. 23 (1967)):

> The application of every person shall show that, under the laws of the jurisdiction in which he is operating or proposes to operate, he is legally qualified or lawfully entitled to engage in the acitivities for which registration is sought.

And one who is not registered cannot obtain an order form, 4/

3/ Of course, this does not foreclose assessment of the tax upon an unregistered transferee who goes ahead and obtains marihuana without the legal right to do so.

4/ Although there is no specific provision which limits the dispensing of order forms, this limitation flows from 26 C. F. R. §§ 152. 67 and 152. 68, which require the signing of applications for order forms by the same person who signed the registration, with comparison of the two signatures by the district director before the order form may issue. It is important to note, too, that improper applications for order forms (including those which indicate that the applicant would not be operating legally under state law) are not disclosed to law enforcement agencies as are proper registrants under the provisions of 26 U. S. C. §§ 4775 and 6107. Such applications are apparently returned without being recorded.

and thus cannot pay the transfer tax which is evidenced by affixing tax stamps to the order form. 5/

These regulations reflect the consistent construction by the agencies charged with administering the Marihuana Tax Act (the Internal Revenue Service and the Bureau of Narcotics 6/) that this Act is to be interpreted as in pari materia with the Harrison Act explicitly declares what has been regarded as implicit in the Marihuana Act, for it provides that an individual may secure an order form for the acquisition of narcotics only for his "use, sale, or distribution * * * in the conduct of a lawful business in said drugs or in the legitimate practice of his profession." 26 U.S.C. §4705(g); see, also, 26 C.F.R. §§ 151.24, 151.42 (1967. 7/ Especially when coupled with the salutary rule that statutes will be construed to preserve their constitutionality and to avoid even a serious constitutional question, the reasonable and consistent administrative construction of the Marihuana Tax Act by the agency "charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new", should be respected. Udall v. Tallman, 380 U.S. 1, 16 (1965). As this Court observed recently, where an administrative rule does not transgress the authority under which it is issued, "it is still the statute which

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5/ See 26 U.S.C. §§ 4743, 4771(a)(1).

6/ Now the Bureau of Narcotics and Drug Abuse, of the Department of Justice.

7/ See United States v. Doremus, 249 U.S. 86, 92 (1919).

speaks, and rule and statute may not be separated into alien elements * * *." Pacific Coast European Conference v. F. M. C., 126 U.S. App. D.C. 230, 235, 376 F.2d 785, 790 (1967). And this respect for administrative interpretation applies with equal force and justification to the provisions of regulatory tax statutes. See United States v. Fisher, 353 F.2d 396, 397-398 (5th Cir. 1965).

The administrative interpretation that these statutes do not contemplate registration by or issuance of order forms to those engaged in activities illegal under local law has long been recognized and sustained. In Nigro v. United States, 276 U.S. 332, 345 (1928), the Court correctly viewed the objective of the order form provisions of the Harrison Act as effecting "a kind of registration of lawful purchasers, in addition to one of lawful sellers * * *." Chief Justice Taft, for the Court, continued: "the order form is not a mere record of a past transaction -- it is a certificate of legality of the transaction being carried on * * *." 276 U.S. at 351. 8/ The Marihuana Tax Act was before the Supreme Court in United States v. Sanchez, 340 U.S. 42, 44

8/ The Court expressly rejected the argument advanced by appellant (Brief, p. 41) that making it a federal crime to deal without using the order form, while making it impossible for unregistered persons to obtain such a form, exceeds the taxing power of Congress and violates the Tenth Amendment. Since the order form requirement tends to keep transactions in regulated drugs above-board and to confine such transactions to registered dealers readily amendable to tax collection, insistence on order forms, even while denying them to certain classes of individuals, is "genuinely calculated to sustain the revenue features." 276 U.S. at 351-354. Accord, United States v. Doremus, 249 U.S. 86, 93-94 (1919).

(1950), and the Court sustained the validity of a prohibitive tax on unregistered transferees because of the indisputable "congressional purpose of restricting traffic in marihuana to accepted industrial and medicinal channels." This Court in Smith v. United States, 106 U.S. App. D.C. 26, 29, 269 F.2d 217, 220, cert. denied, 361 U.S. 865 (1959), recognized the same congressional plan and purpose.

Thus, in light of the way the Marihuana Tax Act has been construed and applied, there is no conceivable inconsistency with the privilege against self-incrimination. Only those persons who can demonstrate that their activities would be lawful under local law are required -- and only they are permitted -- to make any disclosure of information. And by hypothesis, there can in such a situation be no "real and appreciable" risk of incrimination. Individuals in appellant's position, who carry on transactions in marihuana in contravention of local law are not only not expected to register or obtain an order form or prepay the transfer tax; they will not be allowed to do so. Unlike the individuals before the Supreme Court in the wagering and firearms tax cases, Marchetti, Grosso, and Haynes, supra, defendant was not charged with failure to register or pay a tax, which would have incriminated him had he complied. Rather defendant stands convicted of violations which have nothing whatsoever to do with the privilege against self-incrimination. As enacted and applied, the Marihuana Tax Act forbids transactions that are not authorized by compliance with federal prerequisites. Defendant engaged in a course of

conduct for which he had no authority, and in this way exposed himself to criminal sanction. It is irrelevant that he could not have obtained the authority -- by risking incrimination under local law -- which would have legitimated his dealings under the Marihuana Act, for Congress has chosen to outlaw the black market in marihuana conducted by persons who are not within any of the classes specified for lawful business in this drug. This case is essentially indistinguishable from prosecution of a person who practices law or medicine without a license or operates an omnibus without a certificate of public convenience and necessity. It would certainly be no defense to such a prosecution that the individual did not and could not meet the standards and prerequisites for permission to engage in such callings lawfully. Once he proceeds to perform services or activities that only those who have satisfied the prerequisites of the law may engage in, he becomes liable to conviction and punishment. So has the defendant. 9/

9/ In any event, under any conceivable construction of the Marihuana Tax Act, there is no possible self-incrimination problem, much less a real and appreciable risk of incrimination. Section 4742(a) does not require the disclosure of information by a transferor or punish non-disclosure. The defendant was merely obliged by that section to insist that the intended transferee furnish him with the required order form before he sold him marihuana. The failure to perform this statutory duty to refrain from transferring marihuana except in pursuant of a written order from the transferee -- the performance of which would have resulted in non-disclosure of information -- was the crime for which the defendant was convicted. No values protected by the privilege against self-incrimination are affected by the restriction on activity enforced by this conviction.

(2) IT IS UNNECESSARY TO CONSIDER THE VALIDITY OF THE CONVICTION AS TO COUNT THREE.

Where a defendant is sentenced to the same period of incarceration on more than one count and the sentences are to run concurrently, the fact that the appellant was validly convicted on any one count precludes reversal regardless of the validity of the convictions on the other counts.

Sherman v. United States, 320 F. 2d 137, 156 (9th Cir. 1963);

Noah v. United States, 304 F. 2d 317, 318 (9th Cir. 1962);

Bech v. United States, 298 F. 2d 622, 626 (9th Cir. 1962);

Russell v. United States, 288 F. 2d 520, 521 (9th Cir. 1961).

In the instant case, the defendant upon his conviction on Counts One, Two and Three was sentenced to the custody of the Attorney General for five years on each count with the sentences to run concurrently. Since the defendant was validly and properly convicted as to Counts One, and Two, a reversal as to Count Three (charging a violation of Title 26, United States Code, §4742a) is precluded regardless of its validity.

B. DEFENDANT'S CONVICTION WAS NOT OBTAINED BY IMPERMISSIBLE ENTRAPMENT.

The defendant cites several leading cases which relate to the subject of entrapment.

Sherman v. United States, 356 U.S. 369 (1958);

Sorrelis v. United States, 287 U.S. 435 (1932).

The defendant further refers to several cases with regard to the rationale of the defense of entrapment. More precisely the issue with regard to entrapment is: (a) Whether the Government (i.e. . . . officials of the Government) implanted "in the mind of an innocent person the disposition to commit the alleged offense and" . . . induced . . . "its commission in order that they may prosecute", or (b) Whether the " . . . Government agents merely afforded opportunities or facilities for the commission of the offense . . .". The former and not the latter constitute impermissible entrapment.

Sherman v. United States, supra at 372.

The defendant contends that entrapment as a matter of law was established based on the testimony of Agent Knapp. In response to various questions the following wording was used by Agent Knapp in his answers: " . . . I asked Mr. Frazier if he could purchase some narcotics for me. He claimed he could. I then asked him for his telephone number. He wrote it down on a small card and gave it to me. And I told him I would contact him later." [R. T. 54]. It is to be pointed out that the word "narcotic"

is commonly used by agents of the Federal Bureau of Narcotics when the agents are operating in an undercover capacity. When so used the meaning of the word "narcotics" includes marijuana as well as heroin.

"On June 26th I made a telephone call from the undercover telephone in the Los Angeles Bureau of Narcotics office . . . ." [R. T. 54].

"Then I asked him if I could purchase about five kilograms of marijuana from him. He said he thought he could get them, but he would have to make a few phone calls. We then agreed that I would call him back on the 28th to make more definite arrangements [R. T. 55].

When asked if he did in fact call the appellant on the 28th, Knapp replied:

"Yes sir, I did." [R. T. 55].

Further, Knapp related:

" . . . I asked him if I could purchase the marijuana from him tonight. He said it was ready. And then we agreed that I should drive to his residence and meet him there at approximately 8:00 P. M." [R. T. 56].

Agent Knapp then stated:

"At about 8:00 P. M. I drove to his residence at 6615 Farmdale Street in North Hollywood. As I pulled up to the curb in front of his house, he was standing out on the front portion of his lawn. . . ." [R. T. 56].

Based on these responses by Agent Knapp the defendant

draws the conclusion, with no authority, that this is sufficient to show the criminal act engaged in by the defendant originated with an officer of the Government.

The Government respectfully submits that the mere fact that the government officer asked defendant for his phone number, or requested of the defendant if the defendant could purchase marijuana or that the officer made a phone call or that the officer said "I did" . . . does not, under any authority, constitute impermissible entrapment. More precisely it more closely falls in the category of a government officer merely giving a man with a criminal disposition an opportunity to commit a crime. Sherman v. United States, supra, at 372. The evidence on this point is clear. Agent Knapp testified that at the time he first met the defendant, he asked the defendant if he could "purchase some narcotics for me". The defendant said he could. Knapp then asked the defendant for his phone number which the defendant wrote down and gave to Knapp [R. T. 53, 54]. Approximately two weeks later Knapp phoned the defendant and asked if he could purchase five kilograms of marijuana. The defendant replied he thought he could get them, but he would have to make a few phone calls [R. T. 55]. Knapp phoned the defendant two days later and asked if the purchase of marijuana could be made that evening and the defendant replied it was ready [R. T. 56]. After the transfer of marijuana, the defendant complained that he did not make enough money from the transaction and was unhappy with the amount he received [R. T. 60].

The government submits this is merely the giving of an

opportunity to commit a crime to a man with a criminal disposition, or as it was put in Sherman v. United States, supra at 372, "a trap for the unwary criminal". There is no evidence that the defendant was persuaded in any way by the officer to commit the offense or that the officer in any way "twisted the defendant's arm" to get the defendant involved in the commission of this offense. Again, there is absolutely no authority to the effect that the officers conduct in the instant case even approaches impermissible entrapment.

The defendant cites various "tricks" by the government agent which, it is contended, constituted impermissible entrapment. The defendant in his brief asserts that "One point is obvious: Defendant's car had a flat tire, and it was necessary to go to the gas station, fix the tire, return to the house, and mount it on the car before the Frazier car could be used. . . . This, of course, constitutes another of the entrapment devices used by Agent Knapp -- this one to bring about an element of the crime of transporting (i. e., tricking defendant into using his own car to transport the marijuana)."

However, there is nothing in the record to support this obvious point. There is no evidence to indicate that defendant's car had a flat tire or that defendant mounted a tire on his car. More importantly, there is no authority cited to the effect that fixing a flat tire constitutes impermissible entrapment.

Defendant further refers to an alleged inconsistency between the testimony of Agent Knapp and attachment to his brief

marked as Exhibit Two. It is to be pointed out that this particular exhibit is a copy of Agent Knapp's memorandum report and was not introduced as evidence in the trial. (It should also be pointed out that Exhibit One attached to defendant's brief likewise was not introduced into evidence.) The evidence that was adduced at the trial is clear.

On direct examination, Mr. Knapp testified that Frazier told him that the source of supply did not want to meet him [R. T. 57]. While Mr. Knapp was on cross-examination, the Government gave to the defendant a copy of Mr. Knapp's report [R. T. 77]. If there was any inconsistency or alleged inconsistency there was ample opportunity to bring this out on cross-examination. Obviously this was not done.

Both counsel for the defendant and Agent Knapp read the report. Thereafter, no question was posed by defendant's counsel relating to defendant's statement of the source not wanting to meet Knapp. It is clear that the report reflects merely a typographical error. Had defendant's counsel not been convinced of this himself he surely would have gone into the matter on cross-examination of Agent Knapp. Further, on re-direct examination, Mr. Knapp again testified, "Mr. Frazier told me that the unidentified male did not want to meet me" [R. T. 82].

The defendant also asserts that had he not been "required" to take the money to the source and had he not been "required" to take the marijuana from the source to the agent, he would not have violated the essential element of possession of marijuana.

Clearly, the evidence is sufficient to establish constructive possession on the part of the defendant even if there would not have been actual possession. The defendant negotiated with Mr. Knapp and it is apparent that all arrangements were made between defendant and his source. It was the defendant who knew where the transfer would take place [R. T. 57]. Defendant clearly demonstrated his ability to produce marihuana and thus even in the absence of physical possession, there was sufficient dominion and control to constitute possession.

Brothers v. United States, 328 F. 2d 151
(9th Cir. 1964);

Espinoza v. United States, 317 F. 2d 275
(9th Cir. 1963);

Arellanes v. United States, 302 F. 2d 603
(9th Cir. 1962);

Celleno v. United States, 276 F. 2d 941
(9th Cir. 1960).

A last trick asserted by defendant is that the "Government refused to put . . ." Mr. Craig Lasha, a special employee of the Bureau of Narcotics on the witness stand and therefore deprived defendant of the right to cross-examine Mr. Lasha. It is the defendant's contention, once again without authority, that this action indicates impermissible conduct and is entrapment as a matter of law.

It must be again pointed out that Mr. Lasha's only involvement in the instant case is that he introduced Agent Knapp

to the defendant [R. T. 52, 66]. The Government did not intend to call Mr. Lasha as a witness as it was felt he was not needed. Therefore, Mr. Lasha was not present in court at the outset of the defendant's trial. However, during the course of the trial, the appellant for the first time requested the presence of Mr. Lasha [R. T. 68-71]. Prior to the time at which the Government rested its case the court and the defendant were informed that Mr. Lasha was present and available to testify [R. T. 99].

Defendant's counsel acknowledged the fact that he was aware of Mr. Lasha's presence [R. T. 99] and further stated, " . . . I was mostly concerned about the name of the informer" [R. T. 100]. Subsequently, the defense rested without attempting to call as a witness Mr. Lasha who was present and available.

It is clear that where a party calls a hostile witness, the court may permit the party calling the witness to cross-examine and impeach him.

United States v. Kahaner, 317 F. 2d 459
(5th Cir. 1959);

Slade v. United States, 267 F. 2d 834
(5th Cir. 1959);

Mooreman v. United States, 220 F. 2d 589
(5th Cir. 1955).

Therefore, nothing the Government did inhibited or precluded the defendant from calling Mr. Lasha as a witness. As a hostile witness, the defendant could have treated Mr. Lasha as if he was on cross-examination.

C. (1) THE COURT PROPERLY INSTRUCTED THE JURY AS TO THE QUANTUM OF PROOF WITH REFERENCE TO THE DEFENSE OF ILLEGAL ENTRAPMENT.

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(2) IT IS NOT ERROR TO SUBMIT THE QUESTION OF ENTRAPMENT TO THE JURY.

The court gave the following instruction with reference to entrapment [R. T. 156-158].

"The law recognizes two kinds of entrapment: unlawful entrapment and lawful entrapment. Where a person has no previous intent to violate the law, but is induced or persuaded by law enforcement officers to commit a crime, he is entitled to the defense of unlawful entrapment, because the law as a matter of policy forbids a conviction in such a case.

"On the other hand, where a person has the readiness and the willingness to break the law, the mere fact that Government agents provide what appears to be a favorable opportunity is no defense, but is lawful entrapment. When, for example, the Government has reasonable grounds for believing that a person is engaged in the illicit sale of marijuana, it is not unlawful entrapment for a Government agent to pretend to be someone else

and to offer, either directly or indirectly, to purchase narcotics -- marijuana in this case -- from the suspected person.

"If, then, the jury should find beyond a reasonable doubt from the evidence in the case that before anything at all occurred respecting the alleged offense or offenses involved in this case, if the jury should find that the accused was ready and willing to commit the crime such as charged in the indictment, whenever opportunity was offered, and that the Government agents did no more than offer an opportunity, the accused is not entitled to the defense of unlawful entrapment.

"If the accused had no previous interest or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some agent of the Government, then the defense of unlawful entrapment is a just defense and the jury should acquit the defendant.

"In this regard, if the jury should have any reasonable doubt from the evidence in the case as to whether the defendant was the victim of an unlawful entrapment, the jury should acquit the accused."

The authority for this instruction is Notaro v. United States, 363 F.2d 169 (9th Cir. 1966).

It is to be pointed out that this instruction was based on the appellate court decision in Notaro and is not the instruction given in the District Court in the Notaro case. The phrases defendant quotes from the Notaro case appear to refer to the instruction given by the District Court which was the basis for reversal in the appellate court. No authority has been cited which in any way indicates the instruction given in the instant case to be improper.

Defendant contends it is error to submit to the jury the question of whether the police conduct fell below standards and thus was an improper use of government power.

Once again there is no authority submitted to back up this contention.

Further, it is to be pointed out that the court did in fact rule on the issue of entrapment when the defendant moved the court for a judgment of acquittal. This motion was denied [R. T. 110].

D. THERE WAS NOT AN UNREASONABLE LAPSE OF TIME FROM THE DATE OF TRANSACTION IN ISSUE UNTIL THE DATE OF ARREST SO AS TO VIOLATE THE APPELLANT'S CONSTITUTIONAL RIGHTS.

In the instant case, the defendant sold the marijuana to

Agent Knapp on June 28, 1967 and was arrested on September 13, 1967 [R. T. 72, 75]. Thus there was a time period of ten weeks from the commission of the offense to the date of arrest.

Even a fifteen month delay between an offense involving a violation of narcotic laws and arrest has been held not to violate any constitutional rights of an accused, in the absence of special circumstances which indicate the delay has resulted in prejudice to the accused.

United States v. Hammond, 360 F. 2d 688 (2nd Cir. 1966).

It is apparent therefore that the appellant has the burden to show how, in the instant case, the ten-week period from the date of the offense to the date of the arrest was of sufficient length to prejudice him to the extent of impairing constitutional rights.

The only basis for prejudice asserted by the defendant is in relation to the "unidentified male" as this individual was referred to by the prosecution witnesses. It should be pointed out that at no time during the trial did the defendant refer in any way to any prejudice in relation to this "unidentified man". The first time this issue was raised was in the defendant's brief.

Agent Knapp testified as to a conversation between himself and the defendant on June 28, 1967 in the vicinity of Dockweiler and Cochran Streets.

> "Well during the conversation a young Negro male walked past us on the sidewalk and got into a blue Corvair which was parked immediately in front

of Mr. Frazier's car. Mr. Frazier and I finally came to agreement on the money. I gave him $520 of the previously recorded Government money. He took the money and got in the passenger side of the Blue Corvair. Then the car drove west on Dockweiler and was out of sight.

"At about 10:00 P. M., the same blue Corvair pulled alongside of Mr. Frazier's car in which I was waiting and Mr. Frazier got out of the car. He carried a brown paper shopping bag. And he put the shopping bag behind the rear seat, behind the front driver's seat, and then got in the car." [R. T. 57, 58].

Earlier in the evening when Agent Knapp arrived at the defendant's house, Mr. Frazier stated that " . . . he had to call his source of supply and let him know that we are on the way". Agent Knapp's testimony also related that while in the defendant's apartment, Mr. Frazier did in fact place a phone call [R. T. 57].

While the "unidentified male Negro" was unidentified to the Government, he clearly was not unidentified to the defendant. The evidence is especially clear that the defendant entered a vehicle (empty handed) driven by the unidentified male and sometime later returned in the same vehicle driven by the same unidentified person. Upon his return, defendant carried the brown bag which contained the marijuana.

It is a most reasonable inference to make that the phone call the defendant made in his apartment, in the presence of Agent Knapp, was to this unidentified individual. It is also reasonable inference to make that the defendant was proceeding to this individual's residence to notify the "unidentified male" of his presence. Agent Henry saw defendant enter an apartment complex [R. T. 93]. Shortly thereafter, this unidentified individual was seen to enter the vehicle parked immediately in front of defendant's vehicle in which Agent Knapp was seated.

Clearly this man whom the Government refers to as an unidentified male Negro is not unidentified to the defendant. On the contrary, strong inferences can easily be drawn which lead to the conclusion than an association or partnership did in fact exist between this individual and the defendant. Therefore, it is apparent that defendant's contention of prejudice resulting from the ten week period from offense to arrest is completely without merit. Defendant has failed to show any prejudice of any sort.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction of appellant Dennis Frazier should be affirmed.

Respectfully submitted,

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